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October 30, 2001

Karen Getman, Chairman
Fair Political Practices Commission
428 "J" Street, Suite 620
Sacramento, CA 95814

RE: CONFLICT OF INTEREST REGULATIONS
SECTION 18707.4

Dear Chairman Getman:

On behalf of our client, L.A. Care Health Plan, I am writing to reiterate our strong interest in changes to Section 18707.4 of the conflict of interest regulations, an issue scheduled for discussion at the Nov. 5 meeting of the Fair Political Practices Commission. We greatly appreciate the time staff has spent discussing these conflict-of-interest regulations with us and look forward to continuing to work with the Commission on this issue.

Earlier this month, we provided to FPPC staff a detailed letter explaining our issues and why we are requesting specific changes to Section 18707.4, as well as a mock-up of the specific amendments we are suggesting to the section. That letter has been included in the materials provided to the Commission regarding Section 18707.4. This letter provides additional history from L.A. Care's perspective and responds to some of the issues raised in the staff memo regarding this agenda item.

L.A. Care's Efforts to Deal with Conflict –of- Interest Laws

L.A. Care is very concerned with the outcome of this regulatory process because of the difficulties our 13-member Board of Governors faces in carrying out its duties. We have been working on this problem since L.A. Care's inception in 1996. That year, L.A. Care sponsored legislation that would have deemed a Board member to have no financial interest in a decision that would have substantially the same effect on all organizations or individuals of the class that the particular Board member was appointed to represent. That legislation was dropped that same year as a result of FPPC opposition.

In crafting L.A. Care's enabling legislation, the Legislature recognized that the conflict of interest laws could prevent the most knowledgeable persons about the delivery of health care to the Medi-Cal population from serving on L.A. Care's Board of Governors. To avoid this problem, the Legislature enacted Welfare and Institutions Code Section 14087.969. This statute

provides that notwithstanding Government Code Section 1090, L.A. Care can enter into a contract in which member of the Board of Governors has a financial interest as long as the following occur:

- The Board member does not participate in the decision to award a contract to the firm or entity in which he or she has a financial interest.
- The contract "contains substantially the same terms and conditions as contracts entered into with other individuals or organizations that the individual was appointed to represent."
- The Board member does not vote on whether the entity in which the Board Member has a financial interest is awarded a contract.

Unfortunately, this provision did not cover amendments to contracts. Consequently, Board members were able to develop the standard contract language for all of LA Care's contracts because no decision had been made on which firms would obtain a contract, but could not vote on amendments to contracts because in setting the terms and conditions for such amendments they were essentially setting the terms for amendments to the contracts with the stakeholder entity in which they have a financial interest. This situation hamstrung the Board, since nearly every decision made by the Board affects these contracts.

LA Care sponsored legislation this year that would include amendments in the rules contained in Welfare and Institutions Code Section 14087.969. While drafting that legislation, we realized that even if we resolved the Section 1090 issues, the Political Reform Act would still prevent Board members from participating in many of these contractual decisions. In order to deal with this obstacle, we initially attempted to apply Section 14087.969 to the Political Reform Act as well.

We met with FPPC staff after SB 720 was introduced. We learned at that meeting that we would likely face FPPC opposition if we retained the portion of the legislation addressing the Political Reform Act. The staff also informed us that the FPPC was currently considering amending Regulation 18707.4. As a result of our discussions with FPPC staff, we limited SB 720 to Section 1090 and began working with FPPC staff on the regulations.

We are pleased that SB 720 passed both house of the Legislature by nearly unanimous votes and has been signed by the Governor. Effective January 1, 2002, members of LA Care's Board of Governors will be able to vote on amendments to L.A. Care contracts without violating Section 1090, as long as the amendment applies to contracts with other firms in the same stakeholder category the Board member was appointed to represent and the Board member does not participate in any vote to directly apply the amendment to himself or herself or his or her stakeholder entity.

Legislative Intent Would Be Furthered by Changes to Section 18707.4

The Legislature has clearly indicated its intent that LA Care's Board members be permitted to participate in decisions affecting their financial interests as long as the entity in which the Board member has a financial interest is not given special treatment. It would be a pyrrhic victory for our Board members, however, if the PRA were interpreted to prohibit the very type of activity the Legislature decided to permit by enacting SB 720. We hope that the FPPC will amend Regulation 18707.4 to permit the intent of the Legislature to be fully implemented.

We agree with your staff that Section 18707.4 is the best available venue in which to address our concerns. Many of the decisions the L.A. Care Board makes are broad policy decisions that affect classes of health care providers participating in L.A. Care in substantially the same way.

Those health care providers are our "public." Because we have a stakeholder board that includes representatives of our providers, most decisions made by the Board are likely to directly affect the financial interests of at least some of our Board members. As a result of the way the current "public generally" exception is applied, a majority of L.A. Care's Board of Directors are not able to participate in many of L.A. Care's most important and fundamental decisions. These Board members are most often those who have the greatest knowledge about the matters decided—and those the Legislature designated to serve on the Board because of their expertise

This situation has left our Board members extremely frustrated, not only those who are prevented from participating in discussions and voting on items, but also those few members left who have the burden of making critical policy decisions for a health plan serving 700,000 people without hearing the educated perspectives of their colleagues. We do not believe that the Legislature intended this result. The members' frustration, and the resulting difficulty finding board members willing to serve under these conditions, prompted L.A. Care to resume our efforts to deal with these problems this year.

Regulatory Policy Interpreting "Public Generally" Must be Consistent

We appreciate the detailed history that your staff has provided in its memo on this agenda item. The history of this issue over the past quarter of a century demonstrates the FPPC's long-standing policy that the Political Reform Act should not be interpreted to thwart the purposes of the Legislature in creating specialized boards and commissions whose members are appointed to represent the regulated industry or profession and participate in policy making affecting that industry. We strongly support that policy as vital to the functioning of many, many governmental bodies in this state, and encourage the Commission to maintain a consistent policy in this area. This is especially true for L.A. Care, since the Legislature expressed its intent that L.A. Care's stakeholder Board members be permitted to participate in many decisions as possible by enacting Welfare and Institutions Code Section 14087.969 and SB 720 (Margett).

As the staff memo indicates, the "public generally" exception authorized by Government Code Section 87103 has traditionally been applied to boards and commissions overseeing a single industry. L.A. Care represents a slightly different and somewhat new breed of "stakeholder" board in which the Legislature draws from several sectors in order to create a broad-based body on which competing interests are balanced. The goal is for the interested stakeholders to participate in policy-making and develop a consensus. Local rent control boards such as those discussed in *in re Overstreet*, discussed in the staff report, represent one such type of board. The 58 county children and families commissions created by Proposition 10 are another example. But while those Prop 10 commissions have had some conflict-of-interest issues regarding Government Code 1090, because the decisions they make that create financial interest are largely the awarding of grants, and affected commission members properly abstain. L.A. Care is different in that many of its major decisions involve standard policies that are applied equally to all contracting plans or providers of the health plan.

L.A. Care is like many of the other industry boards and commissions in that their "jurisdiction" is both geographic (e.g., the State of California) and bound by industry class or professional license (e.g., licensed pharmacists or registered nurses). One of L.A. Care's major obstacles in interpreting and applying the existing regulations is that none of the regulatory provisions that deal with local—as opposed to statewide—boards or commissions accommodate a board that has both geographic and industry/professional boundaries and deals with more than one industry class or professional license and is designed to balance the financial interests resulting from these potentially competing interest groups. L.A. Care's situation is also somewhat unique because

L.A. Care can financially affect only those industry and professional entities (clinics, physicians, hospitals and health plans) that have chosen to participate in L.A. Care.

Individuals or entities in the same trade or having the same professional license that do not have a contract with L.A. Care or one of its contracting health plans cannot be affected by the decisions of the L.A. Care Board. We believe entities and persons who L.A. Care cannot affect should not be counted in the universe of individuals or entities from which the "significant segment" calculated.

Defining the "public generally" as those persons the board or commission can, in any of its decisions, affect is generally consistent with the thrust of past Commission policy in this area. The language we propose would, as the First District Court of Appeal stated in ***Consumers Union v. California Milk Producers Advisory Board,*** "allow industry board members to participate in governmental decisions that affect their financial interests if such when those decisions would similarly affect others in the same industry, trade or profession." While our board is composed of multiple industries and professions, this fundamental policy is exactly the same as the policy upheld in that case.

Whether a conflict of interest exists should be limited to the impacts of a particular decision on persons and entities that can be financially affected by the decision, not on all members in the same stakeholder class in Los Angeles County. The Legislature agreed with this principal when it adopted and subsequently amended Welfare and Institutions Code Section 14087.969 to permit Board members to participate in decisions in which they would otherwise be interested as long as the decision affects the other firms and entities in the same stakeholder class who contract with L.A. Care. The Legislature enacted Welfare and Institutions Section 14087.969 because the Legislature believed that the public interest would be served by limiting the reach of the conflict of interest laws to the financial impacts of L.A. Care's decisions on those physicians, health care organizations, hospitals clinics and other stakeholders who have chosen to contract with L.A. Care.

The FPPC also tacitly recognizes this distinction in *In re Overstreet* and in Regulation 18707. Subdivision (b) of that regulation limits the "public" for a member of a legislative body—who is elected from a district—to the district the official represents, and does not include the entire jurisdiction of the public agency. That regulation limits the "public generally" to a subset of a geographical area of the governmental entity's jurisdiction. In L.A. Care's case, the public generally should be limited to the subpart of the stakeholder group the Board member is appointed to represent, namely those members of the stakeholder group that have chosen to participate in L.A. Care's programs.

L.A. Care Does Not Wish to Erode Important Protections

We wish to emphasize that in proposing our language, we have no desire to suggest any provision that would allow a Board member, as a result of the "public generally" exception, to vote on a matter that would affect any class or group of individuals in which the Board member has a financial interest other than the class or group the Board member was appointed to represent. The language of the existing section limits the "public generally" exception to decisions that would affect a significant segment of the persons the Board member was appointed to represent, and we have not proposed to alter that limitation. Therefore, a Board member appointed to represent physicians who owns stock in a health care organization that contracts with L.A. Care could not participate in a decision that would have a financial effect on that health care organization.

In addition, we wish to emphasize that we are not suggesting any language that would allow an Board member to vote on a matter that affected only the interests of that Board member or affected that Board member differently than others of the same industry, trade or profession. As we have discussed, Welfare and Institutions Code Section 14087.969 already prohibits such participation, and we agree that this prohibition promotes the public interest.

Requirement of Financial Interest Precludes Qualified Board Members

We have, however, requested language that would eliminate the requirement that the authorizing statute expressly require the member to have the economic interest the member is appointed to represent. We believe that this thwarts the Legislature's desire to obtain expertise and knowledge without regard to whether the individual has a financial interest in the industry or profession. If the Legislature had intended that Board members be required to have the financial interest they represent, it could have imposed this requirement.

The reason L.A. Care's authorizing legislation did not include such a requirement is most likely to reduce the potential conflict of interests. In some cases, such as physicians, the stakeholder nominating entities have been able to find a knowledgeable representative who does not currently have a financial interest in that type of stakeholder. In other cases, this has not occurred. It would seem ironic, indeed, if regulation 18707.4 were interpreted not to apply because the legislation was written to permit, but not require, Board members to be financially interested in decisions affecting the industry, board or profession they were appointed to represent. If this turns out to be the case, the Legislature may amend the L.A. Care's enabling legislation to require certain Board members to have such financial interests. But this does not seem the best way to reduce the possibility that members of appointed boards and commissions will represent their financial interests at the expense of the public.

To require Board members to have the financial interest they represent would also preclude qualified Board members from continuing to serve. For example, the physician representative on L.A. Care's Board is currently the retired president of the University of Southern California School of Medicine. We can foresee nothing that would be gained by amending L.A. Care's legislation to prevent him from serving on the Board merely because he is no longer a practicing physician. It seems that it should be sufficient to meet the intent of Regulation 18707.4 that the legislation permits, but does not mandate, that members of the Board of Governors to have the financial interest the legislation requires them to represent.

Interestingly, Regulation 18707.4 as currently interpreted might, in L.A. Care's case, create a greater conflict of interest situation than it is designed to resolve. L.A. Care might not contract with 10 percent, much less 25 percent, of some of the stakeholder groups the Board members have been appointed to represent. Therefore, applying the Regulation as currently written and interpreted will have the effect of permitting some Board members to participate in decisions affecting the stakeholder they represent while preventing Board member representing other stakeholders' interests that would also be affected in these decisions from participating. This will alter the balance of interests the Legislature intended to create by providing for representation on the Board of the institutions, boards and professions that L.A. Care can be affect.

We understand that the FPPC in assisting L.A. Care to resolve it problems does not want to amend the Regulation in a way that will have unintended consequences for other appointed boards and commissions. We believe that the language we have proposed for amending Regulation 18707.4 does not "open the floodgates" for other agencies. However, we are

certainly open to working with staff to develop alternative language if the FPPC believes that the proposed language is broader than L.A. Care needs to avail itself of the Regulation.

In summary, L.A. Care's enabling legislation, which specifies the types of stakeholders who constitute the Board, embodied the Legislature's intent to create a board of experts and community interests who would oversee the policy and operations of the health plan. This intent, which is no different from the Legislature's purpose in creating many other boards and commissions regulating single industries or professions, cannot be fulfilled without the ability of Board members to contribute their personal expertise and the perspective of their respective nominating entities. The conflict of interest regulations should not be construed in a way that thwarts the Legislature's intent.

We hope that you will consider our suggestions. As always, if you have any questions, please feel free to call me at (916) 447-7933.

Regards,

MAUREEN O'HAREN

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